IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16091 of 2003
with
Civil Application No. 8393 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL AVENUE CO OP HOUSING SOCIETY LTD.

Versus

CO OP BANK OF AHMEDABAD LTD.

Appearance:
1. Special Civil Application No. 16091 of 2003
MR MB GANDHI for Petitioner No. 1
MR SAURABH G AMIN for Respondent No. 1
GOVERNMENT PLEADER for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: /12/2004

CAV JUDGEMENT

In this petition under Article 226/227 of the Constitution of India the petitioner Cooperative Society has prayed for an appropriate writ, direction or order directing the respondent No.2 Recovery Officer to

withdraw the attachment and return possession of the property in question to the concerned parties or to the society of the shops and offices situated on the 3rd and 4th floor of the premises known as 'Patel Avenue' situated on Sarkhej Gandhinagar Highway, Bodakdev, Ahmedabad. It is also further prayed to quash and set aside the order dated 2.10.2003 passed by the Gujarat State Cooperative Tribunal in Miscellaneous Application No. 123 of 2003. It is also further prayed for an appropriate direction or order directing the Registrar of the Gujarat State Cooperative Tribunal to accept the appeal and to decide the said appeal by the Tribunal on merits.

2. The dispute is in respect to land/property bearing Revenue Survey No. 447 Paiki 6880 sq.mtrs. situated at Bodakdev, Taluka City, District-Ahmedabad which is known as 'Patel Avenue'. The original judgment-debtor Sureshchandra Gordhandas (HUF) and others are owners of the land bearing Survey No. 447 Paiki 6880 sq.mtrs. of land at Bodakdev along with other properties. The respondent No.1 Bank had given loan to M/s. Sun Industries, Sureshchandra Gordhandas Patel (HUF), Vinodchandra Gordhandas Patel (HUF), Pragnaben Patel, Dharesh Patel, Arpita Patel, Shaileshkumar Patel, Mahesh Patel, Sureshchandra Patel, Mahendrabhai B. Patel, Dr. Gitaben Munshi, Maheshbhai D. Munshi and Vinodchandra Gordhandas Patel [hereinafter referred to as "judgment-debtors"]. As the said loan was not repaid, the respondent No.1 had filed Lavad Suit No. 117 of 2001 before the Board of Nominees at Ahmedabad. The said suit came to be decreed in favour of respondent No.1 Bank, vide judgment and decree dated 26.11.2001 for an amount of Rs. 1,25,70,338 along with interest at the rate of 21% from 19.7.2001. As the said amount due and payable under the award was not paid by the original judgment-debtors the respondent No.1 Bank initiated proceedings for recovery of the amount and proceedings were initiated to get the aforesaid award executed under the provisions of the Bombay Land Revenue Code. Necessary Recovery Certificate was issued by the Registrar and the Deputy Mamlatdar was appointed as Special Recovery Officer. In exercise of the said powers the Special Recovery Officer has attached the shops situated on the 3rd & 4th floor of the building namely 'Patel Avenue' and therefore the petitioner has preferred the present Special Civil Application under Article 226/227 of the Constitution of India with the aforesaid prayers.

3. It is the contention on behalf of the petitioner

society that the property in question is already sold to the petitioner society and only a formal sale deed was required to be executed with regard to the property in question and therefore it is submitted that the Special Recovery Officer has no jurisdiction to attach the property which does not belong to the judgment-debtors. To show and establish that the property in question is sold to the petitioner society, the petitioner has relied upon the following documents;

(1) The registered Banakhat executed by the power of attorney holder of the judgment-debtors in favour of Patel Avenue Cooperative Housing Society (proposed) dated 22.11.1999 (Page 57).

(2) Supplementary Possession Agreement dated 4.2.2000 executed by the power of attorney holder of the judgment-debtors, i.e. Raj Bholabhai Patel.

(3) Power of attorney executed by the judgment-debtors in favour of Bholabhai Patel and Raj Bholabhai Patel.

(4) The Annexure 'A' to the Supplementary-cum -Possession Agreement dated 4.2.2000 to show the amount is paid by the society to the judgment-debtors (Page 171).

(5) The Project Development and Consultant Agreement dated 28th January 1999 executed between the judgment-debtors and one M/s. Mangal Sagar Associates (Developers) Pvt.Ltd.

3.1. Relying upon the aforesaid documents, Shri MB Gandhi, learned advocate appearing for the society had submitted that the property known as 'Patel Avenue' has been constructed by the petitioner society and the land in question and the shops/offices which are constructed upon the said property have been sold to other persons and therefore when the land in question is not of the ownership of the judgment-debtors the Recovery Officer has no authority to attach the said property while executing the judgment and award passed by the Board of Nominees. He, therefore, requested to quash and set aside the order of attachment.

3.2. It is also further submitted on behalf of the petitioner that being aggrieved and dissatisfied with the judgment and award passed by the learned Board of Nominees, Ahmedabad, in Lavad Suit No. 117 of 2001 the petitioner society had preferred Miscellaneous

Application No. 123 of 2003 and prayed for to allow the petitioner to prefer the appeal. However, the same came to be dismissed by the Tribunal vide order dated 22.10.2003 on the ground that the petitioner has not annexed the copy of the judgment and award passed by the learned Board of Nominees. It is the case of the petitioner that subsequently the petitioner had approached the Tribunal along with the copy of the judgment and award passed by the Board of Nominees but the same was not entertained and therefore the petitioner has prayed for quashing and setting aside the order dated 22.10.2003 passed by the Tribunal in Misc. Application No. 123 of 2003 and to direct the Tribunal to accept the appeal and decide the same on merits. [It is pertinent to note that the petitioner has not produced any documentary evidence to show that subsequently the petitioner had approached the Gujarat State Cooperative Tribunal along with the copy of the judgment and award passed by the Board of Nominees and that the Tribunal has not accepted the same).

4. In response to the notice issued by this Court, Shri Saurabh Amin, learned advocate appeared on behalf of the respondent No.1 and an affidavit-in-reply is also filed on behalf of the respondent Bank. It is submitted on behalf of the respondent No.1 Bank that there is a judgment and award passed by the Board of Nominees against the judgment-debtors for an amount of Rs. 1,25,70,338 along with interest; that the property in question, i.e. the land bearing Survey No. 448 of Bodakdev on which Patel Avenue is constructed is of the ownership of the judgment-debtors and even today as per the revenue records the judgment-debtors are the owners of the said property. It is also further submitted that the judgment-debtors also owe Rs. 3,47,00,000 to one Kalupur Cooperative Commercial Bank and a further sum of Rs. 1,80,00,000 to Vijaya Bank. It is therefore submitted that to defeat the dues of various banks and to put the properties out of the reach of the banks the judgment-debtors have fraudulently created various documents in favour of their friends and relatives without consideration to create 3rd party rights in the said properties. It is also further submitted that prior to attachment of the shops etc., the Bank had attached 3 other properties of the judgment-debtors out of which in 2 properties 3rd party rights have been created. It is further submitted that in the case of this property also the judgment-debtors have executed development agreement, power of attorney in favour of their relatives and agreement to sell to create 3rd party rights, and subsequently have got-up and forged one

supplementary-cum-possession deed and the same has been relied upon by the petitioner society to create a show that the judgment-debtors have no right, title or interest on the land or building. It is submitted that all the aforesaid documents are totally fraudulent and got-up documents.

4.1. It is submitted on behalf of the respondent No.1 Bank that the petitioner is not the owner of the property in question and they are only an agent who has been entrusted the work of development of the land as a developer and for that purpose the respondent No.1 Bank has relied upon the document which is produced by the petitioner, i.e. Project Development and Consultant Agreement executed on 20th January 1999 by the judgment-debtors in favour of M/s. Mangal Sagar (Developers) Pvt.Ltd., (Page 79). It is submitted that the said agreement has been executed and signed by one Raj Bholabhai Patel as Director of M/s. Mangal Sagar Associates and the said Raj Bholabhai Patel is son-in-law of one of the judgment-debtors. It is further submitted that considering Pages No. 19 and 20 of the said agreement the said Mangal Sagar Associates or Raj Bholabhai Patel was entrusted with the job of developing the property and for the same they were to be paid 10% as development fees and the balance amount received was payable to the landowners, i.e., judgment-debtors. Thus, it is submitted that Mangal Sagar Associates is only an agent of the judgment-debtors/land-owners. Therefore it is submitted that on the basis of the said Project Development and Consultant Agreement, the said Mangal Sagar Associates was an agent/developer of the land in question. It is further submitted that in Pages No. 168 and 169 of the present proceedings in the affidavit-in-rejoinder it is admitted by the petitioner that the petitioner society has been created by M/s. Mangal Sagar Developers in the year 2000. Thus even the petitioner society which is created by M/s. Mangal Sagar Developers is also an agent/developer and nothing further than that. It is further submitted that so far as the Supplementary-cum-Possession Agreement dated 4.2.2000 is concerned, it is a fraudulent document subsequently got-up. In the affidavit-in-rejoinder it is submitted that Annexure 'A' to the Supplementary-cum-Possession Agreement is annexed with the said rejoinder (Page 171). It is submitted that the statement of account on Page 171 submitted along with the affidavit-in-rejoinder is the Annexure 'A' to the said Supplementary-cum-Possession Agreement and on the basis of the said statement of account - Annexure 'A' to the said agreement the petitioner has contended that the entire amount which comes to Rs. 1,77,00,000 is paid to the

judgment-debtors. On the basis of the aforesaid Annexure 'A' it is submitted on behalf of the respondent No.1 Bank that in the document namely, statement of account annexed as Annexure 'A' to the Supplementary-cum -Possession Agreement dated 4.2.2000, the date with regard to payment is in the year in 2001-2002. On the basis of the aforesaid fact it is submitted that when the aforesaid agreement is executed on 4.2.2000 and in the Annexure 'A' annexed to the agreement the payment of consideration is mentioned then in that case the date of payment cannot be subsequent to 4.2.2000. It is therefore submitted and contended that the Supplementary-cum-Possession Agreement dated 4.2.2000 and Annexure 'A' thereto which is at Page 171 are fraudulent and got-up one.

4.2. It is also further submitted that so far as reliance placed upon the agreement to sell dated 22.11.1999 executed by power of attorney Bholabhai Patel in favour of Patel Avenue Cooperative Housing Society, i.e. the petitioner herein is concerned as at the relevant time the society was not registered at all which came to be registered thereafter on 4.2.2000, considering the judgment of the Hon'ble Supreme Court reported in 2002(1) G.L.H. 290 the said Agreement to Sell in favour of the proposed society is null and void ab initio and no right, title or interest is created by the same.

4.3. On the basis of the aforesaid submissions, it is contended on behalf of the respondent No.1 Bank that the Agreement to Sell is a void contract; the Supplementary-cum-Possession Agreement does not inspire confidence which is subsequently a got up and fraudulent document which cannot be considered at all; no consideration has been paid by the society to the judgment-debtors; the petitioner society is not the owner of the land; as per the development agreement the society is only an agent appointed to develop the land who is entitled to 10% as development charge; the Bank thus by virtue of the decree is entitled to recover its dues from all and other properties of the judgment-debtors as the property in question belongs to the debtors; and therefore the attachment carried out by the Special Recovery Officer in execution of the decree is just and proper and in accordance with the provisions of law.

5. Civil Application No. 8393 of 2003 is filed by the judgment-debtors for allowing them to be joined as party-respondents to the present Special Civil Application. Shri RC Jani, learned advocate appeared on behalf of the newly added party, i.e., judgment-debtors/original land owners and contended that

the land in question is never sold to the petitioner society and that they continue to be the owners of the property in question.

6. Heard the learned advocates appearing for the parties. A Lavad Suit No. 117 of 2001 came to be filed by the respondent No.1 Bank against original-borrower, i.e., M/s. Sun Industries and others and judgment and award is passed for an amount of Rs. 1,25,70,338 with interest at the rate of 21% from 19th July 2001. Property in question is in the name of original land-owners, i.e., the borrowers/guarantors. Even as on today also in the revenue record the property in question is in the name of Gordhandas Tribhovandas (HUF) and other persons who are the judgment-debtors. The title of the property in question is not passed to other persons inclusive of the petitioner herein. Under the circumstances, the respondent No.1 Bank has initiated the proceedings to recover the aforesaid amount of Rs. 1,25,70,338 plus interest at the rate of 21% with effect from 19th July 2001 and by virtue of Section 103 of the Gujarat Cooperative Societies Act they have chosen to get the decree executed under the provisions of the Land Revenue Code. Necessary certificate of the Registrar is granted and the Deputy Mamlatdar is appointed as a Special Recovery Officer who is exercising the powers of the Collector. In exercise of the said powers the Special Recovery Officer attached the shops situated on the 3rd and 4th Floor of the building namely 'Patel Avenue'. At this stage, the petitioner, i.e., Patel Avenue Cooperative Housing Society Ltd., has preferred the Special Civil Application challenging the aforesaid action by alleging inter alia that the said land has been sold to them by the judgment-debtors and now they have no right, title and interest over the same and therefore the attachment is bad. As stated hereinabove the petitioner has relied upon the following documents;

(1) The registered Banakhat executed by the power of attorney of the judgment-debtors in favour of Patel Avenue Cooperative Housing Society (proposed) dated 22.11.1999;

(2) Supplementary Possession Agreement dated 4.2.2000 executed by the power of attorney holder of the judgment-debtors, i.e., Raj Bholabhai Patel;

(3) Power of Attorney executed by the judgment-debtors in favour of Bholabhai Patel and Raj Bholabhai Patel;

(4) Annexure 'A' to Supplementary Possession Agreement dated 4.2.2000 to show that the amount is paid by the petitioner society to the judgment-debtors towards the sale consideration;

(5) The Project Development and Consultant Agreement dated 28th January 1999 executed between the judgment-debtors and one M/s. Mangal Sagar Associates and Developers Pvt.Ltd.

7. So far as the reliance placed upon by the petitioner on the registered Banakhat executed by the power of attorney holder of the judgment-debtors in favour of the petitioner society dated 22.11.1999 is concerned, the said agreement in favour of the petitioner society is null and void ab initio and no right, title or interest of any nature can be transferred in favour of the petitioner by virtue of the aforesaid agreement to sell. The agreement to sell dated 22.11.1999 is in favour of a proposed cooperative society as at the relevant time, i.e. on 22.11.1999 the petitioner society was not registered and it was a proposed society. Considering the judgments of the Hon'ble Supreme Court of India in the case of Maneklal Mansukhbhai Co.Op. Housing Society Ltd. vs. Rajendrakumar Maneklal Shah & Anr. , reported in 2002(1) GLH 290 and the judgment of this Court in the case of Ashokkumar J. Pandya vs. Suyog Co-operative Housing Society Ltd. & Ors. reported in 2002(3) GLR page 2521, the agreement in favour of the society is void ab initio and does not confer any right, title or interest in favour of the petitioner society on the basis of the said agreement to sell and therefore the same are not helpful to the petitioner.

8. So far as the Project Development and Consultant Agreement dated 28th January 1999 executed between the judgment-debtors and one M/s. Mangal Sagar Associates (Developers) Pvt.Ltd., and the power of attorney executed by the judgment-debtors in favour of Bholabhai Patel and Raj Bholabhai Patel are concerned, the same also hardly help the petitioner to establish that the property in question is sold to the petitioner society. Considering Paras 19 and 20 of the said Development Agreement, the said Mangal Sagar Associates (Developers) Pvt. Ltd., is entrusted with the job of developing the property and for the same they were to be paid 10% as development fees and the balance amount received was payable to the land owners, i.e. to say the judgment-debtors. Raj Bholabhai Patel has signed as a Director of Mangal Sagar Associates. The very Raj Bholabhai Patel is the power of

attorney holder of the judgment-debtors. The very Mangal Sagar Associates (Developers) Pvt.Ltd has formed the petitioner society, i.e., Patel Avenue Cooperative Housing Society Pvt.Ltd. Thus, the said Mangal Sagar Associates are only agents of judgment-debtors land-owners and thus the petitioner society in turn is also only an agent of the judgment-debtors/land owners, as in affidavit-in-rejoinder on Page 169 one Jatin Chinubhai Patel, Chairman of Patel Avenue Cooperative Housing Society has stated as under;

> "That in this case, the suit was filed in the year 2001 and decree was passed in the year 2001 but much prior to that way back on 28th January 1999 a Development Agreement was executed with M/s. Mangal Sagar Developers. That thereafter the said M/s. Mangal Sagar Developers created a cooperative housing society known as 'Patel Avenue Cooperative Housing Society Ltd', which is also registered in the year 2000."

Thus, considering the Project Development and Consultant Agreement dated 20th January 1999, M/s. Mangal Sagar Associates (Developers) Pvt. Ltd., and the petitioner society are only agents of judgment-debtors and no title has passed on in favour of the petitioner society. There is no other documentary evidence to show and suggest that the title is passed over in favour of the petitioner society. As stated hereinabove even in the revenue record also the names of original landowners/original debtors are shown and therefore on the basis of the aforesaid facts if the Special Recovery Officer has attached the property in question in execution proceedings to recover the amount due and payable by the judgment-debtors to the extent of Rs. 1,25,70,338 plus interest at the rate of 21% with effect from 19th July 2001 it cannot be said that there is any illegality committed by the respondent No.1 Bank and/or the Special Recovery Officer. Considering the aforesaid facts, the reliance placed by the petitioner upon the Project Development and Consultant Agreement and the Power of Attorney executed by the judgment-debtors in favour of Bholabhai Patel and Raj Bholabhai Patel will also not be helpful to the petitioner to establish that the property in question is sold to the petitioner society. At this stage, one another thing requires to be considered is that the said Raj Bholabhai Patel is son-in-law of one of the judgment-debtors. The said Raj Bholabhai Patel is the power of attorney holder of the judgment-debtors, the said Raj Bholabhai Patel has signed as Director of M/s.

Mangal Sagar Associates (Developers) Pvt. Ltd., in the Project Development and Consultant Agreement dated 28th January 1999 and even the Supplementary-cum-Possession Agreement is also signed and executed by the said Raj Bholabhai Patel as the power of attorney holder of the judgment-debtors. Thus, from the aforesaid fact it is very clear that in order to avoid payment of dues to the Banks and with a view to put their properties out of the reach of the banks, the judgment-debtors have fraudulently created various documents in favour of their friends and relatives without consideration to create third party rights in the said properties. At the time of hearing of the present Special Civil Application, it was pointed out by the ld. advocate appearing on behalf of the respondent No.1 Bank that apart from the fact that the judgment-debtors are indebted to the respondent No.1 Bank to the tune of Rs.1,25,70,338, they also owe Rs. 3,41,00,000 to one Kalupur Commercial Cooperative Bank and a further sum of Rs. 1,80,00,000 to one Vijaya Bank. He has also further submitted that prior to the attachment of the properties, the Bank had attached 3 other properties of the debtors, out of which in 2 properties, 3rd parties' rights have been created. Similarly, in case of the property in question also the parties have come out with a case with regard to third party rights.

9. The petitioner has also relied upon the Supplementary-cum-Possession Agreement dated 4.2.2000 executed by the power of attorney holder of the judgment-debtors, i.e. Raj Bholabhai Patel and also Annexure 'A' to the Supplementary-cum-Possession Agreement dated 4.2.2000 to establish and show that the property in question is sold to the petitioner-society. By Annexure 'A' to the Supplementary-cum-Possession Agreement dated 4.2.2000 the petitioner has tried to show that the property in question is sold to the petitioner society for consideration and an amount of Rs. 1,78,60,273 is paid to the judgment-debtors. If we consider Annexure 'A' to the Supplementary-cum-Possession Agreement dated 4.2.2000 which is at Pages No. 171 to 174, it is very much clear that the Supplementary-cum-Possession Agreement dated 4.2.2000 is a fraudulent document subsequently got-up, as statement and Annexure "A" shows that payments were made in the year 2001-2002, whereas the Supplementary-cum-Possession Agreement as claimed by the petitioner was executed on 4.2.2000. Even the said Supplementary-cum-Possession Agreement dated 4.2.2000 on a stamp paper of Rs. 20 dated 30th August 1998 has been signed and executed by Raj Bholabhai Patel as power of attorney holder of the

judgment-debtors in favour of Patel Avenue Cooperative Society which, as per their own admission, is incorporated by Raj Bholabhai Patel and M/s. Mangal Sagar Associates. Thus, considering the aforesaid facts and circumstances, it is established beyond doubt that the document itself, i.e., the said Supplementary-cum-Possession Agreement and Annexure 'A' to the said agreement are fraudulent and subsequently got-up and created documents which are produced to show that the property in question is purchased by the petitioner society for a consideration of Rs. 1,78,60,273. Thus, no reliance can be placed upon the aforesaid documents. Thus, considering the aforesaid facts and circumstances and the fact that not a single documentary evidence which is relied upon by the petitioner to show that the property in question is purchased by the petitioner society can be relied upon, the contention of the petitioner society that the petitioner society has purchased the property in question cannot be accepted and therefore the challenge by the petitioner society to the action of the Special Recovery Officer of attaching the property, namely shops on the 3rd and 4th floors of the building namely Patel Avenue also fails.

10. Considering the aforesaid facts and circumstances of the case more particularly considering the fact that there is a judgment and award passed by the Board of Nominees for an amount of Rs.1,25,70,338 with interest at the rate of 21% from 19th July 2001; that the property in question is in the name of original land-owners/judgment debtors; that the said property is attached in execution by the Special Recovery Officer; and considering the Project Development & Consultant Agreement dated 28th January 1999 executed between the original-developers and said M/s. Mangal Sagar Associates (Developers) Pvt. Ltd., it is apparent that the said M/s. Mangal Sagar Associates (Developers) Pvt. Ltd and the petitioner-society are only the agents of the judgment-debtors to develop the land in question and they are entitled to only 10% as 'development charges'. Therefore, it cannot be said that the action of the respondent No.1 Bank as well as the Special Recovery Officer to attach the shops situated on 3rd and 4th floor of the building namely Patel Avenue is in any way illegal and/or arbitrary and/or without jurisdiction which requires interference of this Court exercising power under Article 226/227 of the Constitution of India.

11. So far as the prayer of the petitioner to quash and set aside the order passed by the Gujarat State Cooperative Tribunal dated 22.10.2003 passed below

Miscellaneous Application No. 123 of 2003 is concerned, in view of the fact that the petitioner challenged the judgment and award passed by the learned Board of Nominees without the certified copy of the judgment and award the Tribunal dismissed the said Miscellaneous Application on the ground that in absence of the certified copy the application is required to be dismissed and therefore it cannot be said that the said order being illegal is required to be quashed and set aside by this Court.

11.1. So far as another prayer of the petitioner directing the Registrar of the Cooperative Tribunal and the respondent No.3 herein to accept the Appeal and to number it and thereafter be directed to place the same before the appropriate Tribunal for deciding the matter on merits is concerned, the petitioner has not produced any documentary evidence on record to show that the petitioner had at any time after the order dated 22.10.2003 passed in the said Miscellaneous Application No. 123 of 2003 approached the authority with the certified copy and that the Tribunal had not accepted the same and therefore in absence of any documentary evidence on record to show that the petitioner had approached the Tribunal, the said prayer also cannot be granted.

12. For the reasons stated hereinabove, there is, therefore, no substance in the present Special Civil Application and the same deserves to be dismissed and is accordingly hereby dismissed. Notice is discharged. The ad-interim relief granted earlier stands vacated forthwith.

13. In view of dismissal of the Special Civil Application, no orders on the Civil Application No. 8393 of 2003. It stands disposed of accordingly. Rule is disharged.

[M.R. Shah, J.]

rmr.